If followed, therefore, that this application was dismissed as also were application nos 50-89, 4-90, 28-90, 31-90, 34-90, 40-90, 43-90, 80-90 and 7-90 wherein the same contentions were relied upon and which it had been agreed by counsel therein should abide the result of the present application.

Applications dismissed.

Solicitors: *Shan & Gooi.*

Reported by *Zarinah Marican*

Sarawak Commercial Banks Association v Sarawak Bank Employees' Union

HIGH COURT (KUCHING) — ORIGINATING MOTION NO KG 10 OF 1989
HAIDAR J
9 FEBRUARY 1990

Administrative Law — Error of law — Whether lack or excess of jurisdiction — Grant of certiorari — Whether jurisdiction of court limited by ouster clause — Formula for computation of CPI increase — Whether justifiable — Industrial Relations Act 1967, s 30(7)

An employment dispute between the applicant and the respondent was referred by the Minister of Labour to the Industrial Court for adjudication, and Award No 56 of 1989 was handed down. The respondent applied for an order of certiorari to remove the case into the High Court for the purpose of quashing a portion of the award made by the Industrial Court on the grounds that:

(a) a retrospective order effective from 1 January 1988 made by the Industrial Court was in breach of s 30(7) of the Industrial Relations Act 1967; and
(b) the biased computation of CPI increase in the Award No 9 of 1989 was used as authority to apply to the present award.

Held, dismissing the application:

(1) The word 'may' in s 30(7) of the Industrial Relations Act 1967 is to be read as discretionary, and at the most directory, since the restriction imposed on the power to make the award retrospectively is applicable only in cases where the parties do not agree on the effective date of the agreement. Further, if the implementation date in respect of rates of pay is not the same as the other matters, it would lead to absurdity as the rates of pay to a certain extent hinge on the other matters. In addition, it does not make it extraordinarily difficult for the applicant to keep the industry going by such a retrospective order (earlier by two weeks).

(2) The Industrial Court has the power to make a retrospective order of the award though restricted to not earlier than six months from the date on which the dispute was referred to the Industrial Court. At most, there is only an error of law committed by the Industrial Court which does not go to lack or excess of jurisdiction.

(3) The error committed by the Industrial Court in this case constitutes an error of law on the face of the record and effectively ousts the jurisdiction of the High Court to quash the part of the award.

(4) As regards the computation of the CPI increase, the findings of the Industrial Court cannot be said to be so perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. It is to be noted that the Industrial Court was not computing on an absurd percentage though it could make errors in the computation. What the Industrial Court did was to be consistent in its computation and not depart from its earlier computation, which the applicant wanted the Industrial Court to do. The Act does not specify the formula for the computation on the rates of pay and the legislature thought it best to leave it to the Industrial Court to find the basis for such computation.

Cases referred to

1 *Malayan Commercial Banks Association* v *National Bank Employees* (Award No 9/89) (unreported) (refd)
2 *Sabah Banking Employees' Union* v *Sabah Commercial Banks' Association* [1989] 2 MLJ 284 (follid)
3 *Fung Keong Rubber Manufacturing (M) Sdn Bhd* v *Lee Eng Kiat & Ors* [1981] 1 MLJ 238 (not follid)
4 *Non-Metallic Mineral Products Manufacturing Employees' Union* v *Malaya Glass Factory Bhd* [1985] 1 MLJ 129 (refd)
5 *Hotel Equatorial (M) Sdn Bhd* v *National Union of Hotel, Bar & Restaurant Workers & Industrial Court of Malaysia* [1984] 1 MLJ 363 (follid)
6 *Federal Hotel Sdn Bhd* v *National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 (distd)
7 *Malayawata Steel Bhd* v *Union of Malayawata Steel Workers* [1978] 1 MLJ 89 (not follid)
8 *Malayan Commercial Banks Association* v *National Union of Bank Employees* [1981] 2 MLJ 183 (refd)
9 *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165 (follid)
10 *Re Dunlop Estates Bhd* [1981] 1 MLJ 249 (follid)
11 *Malayan Banking Bhd* v *Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 13(3), 26(2), 30(5), (7), 33, 33B(1), 56(2)(c)

TM Varughese (*ST Sulong* with him) for the applicant.
KP Gangadharan (*ST Wong* with him) for the respondent.

Cur Adv Vult

Haidar J: The Sarawak Commercial Banks Association ('the applicant') filed an application by way of notice of originating motion (encl 7) for:

> An order for certiorari to remove into this court for the purpose of its being quashed that part of the award relating to art 19 — rates of pay — on pp 3 to 8 and on p 14 and appendices 1 and 2 in the first schedule of Industrial Court Award No 56 of 1989.

The grounds as set forth in the copy of the statement filed on 25 May 1989 are:

(i) the order made in art 19(2) on p 14 of the award is in breach of s 30(7) of the Industrial Relations Act 1967,

(ii) the findings made in para 8 on p 7 of the award are erroneous which led to absurd results and/or reached results absurdly;

(iii) the Industrial Court's refusal to admit/amend its error in the computation of CPI increase in Award No 9/89 and its persistence to follow its own said Award No 9/89 as authority to apply to Award No 56/89 shows that the court was biased in its approach to the issue;

(iv) the findings and the decision arrived at by the Industrial Court is perverse and so devoid of plausible justification that no reasonable body of persons could have reached them.

The applicant and the Sarawak Bank Employees' Union ('the respondent') had entered into a collective agreement relating to the terms and conditions of service executed on 26 June 1985 for the period 1985-1987 and taken cognizance of by the Industrial Court on 18 September 1985 vide Cognizance No 248/85. When the agreement expired on 31 December 1987, the respondent submitted a fresh proposal to the applicant with a view to entering into a new collective agreement. The parties had not been able to conclude a new agreement and their dispute was referred to the Industrial Court for adjudication by the Minister of Labour under s 26(2) of the Industrial Relations Act 1967 ('the Act'). The Minister of Labour made the reference on 15 July 1988. It is agreed that it is a trade dispute within the meaning of s 26(2) of the Act. It is also agreed that the law to be considered in this application is as at 15 July 1988. The dispute was heard by the Industrial Court on 20 and 21 February 1989 and Award No 56/89 dated 15 April 1989 was handed down on 5 May 1989.

At the hearing before the Industrial Court, the parties agreed to follow all the terms and conditions of employment for bank employees in Peninsular Malaysia in the case of *Malayan Commercial Banks Association* v *National Bank Employees*[1] (Award No 9/89), except:

(1) art 7 — leave on trade union business;
(2) art 19 — rates of pay;
(3) art 24 — medical benefits;
(4) art 27 — meal allowance;
(5) art 30 — sick leave;
(6) art 33 — retirement benefits; and
(7) art 36 — new technology.

However, in the course of the proceedings, the parties further agreed to arts 7, 24 and 30, thus leaving only arts 19, 27, 33 and 36 for adjudication. At the hearing of the application before me, the applicant only confined itself to art 19, ie rates of pay, and the consequential orders that will follow if the applicant succeeds and also the issue of retrospective order made by the Industrial Court. As for art 33, retirement benefits, this issue has been referred to the Supreme Court and the parties are awaiting the outcome of the Supreme Court decision and hence no decision was made by the Industrial Court.

In attacking the Industrial Court decision in respect of art 19 (rates of pay), the applicant is essentially relying on:

(a) the retrospective order made to be effective from 1 January 1988 is in breach of s 30(7) of the Act; and
(b) the biased computation of CPI increase in Award No 9/89 as authority to apply to the present Award No 56/89.

Is the restropective order in breach of s 30(7) of the Act?

It is to be borne in mind that the aborted agreement is a renewal of the previous collective agreement which expired on 31 December 1987. In effect, the new agreement is to commence on 1 January 1988 but for the failure to reach the collective agreement and hence the reference of the dispute to the Minister of Labour. In essence the duration of the new agreement is not disputed as I said earlier it is supposed to be a continuation of the previous agreement. By virtue of para 2 of the Award (p 128 of the record), art 2 is a consent item. Article 2 reads:

> This Award shall be deemed to have come into effect on 1 January 1988 and shall continue to remain in force until 31 December 1990 and thereafter, until superseded by a new agreement.

However, Mr Varughese, counsel for the applicant, submitted that even though it is clear that the rest of the items that were agreed on are to be effective from 1 January 1988 but since art 19 (rates of pay) is a disputed item, the Industrial Court should not follow the agreed effective date to be applicable to the other disputed items. With respect, I do not see the logic of such an argument as art 2 (pertaining to the date of the coming into force of the agreement) is an agreed item and there is no qualification to art 2 at all. In that event, in my view, the implementation of all the articles in the agreement will have the same effective date. The issue for me to consider is whether the retrospective order made by the Industrial Court is in breach of s 30(7) of the Act and if so whether such breach is an error of law or that error goes to jurisdiction, power or validity.

It is, I think, not disputed that if we go by the date (ie 15 July 1988) the Minister of Labour referred the dispute to the Industrial Court under s 26(2) of the Act, that in order to keep within the time frame stipulated under s 30(7) of the Act, the Industrial Court should not order a retrospective date earlier than 16 January 1988. The dispute here does not come under the exceptions to the proviso in s 30(7) either, namely, a decision of the Industrial Court under s 33 (interpretation and variations of awards and agreement) or an order of the said court under

s 56(2)(c) (non-compliance with award or collective agreement) or an award of the said court for the reinstatement of a workman on a reference to it in respect of the dismissal of a workman.

It is now settled law that an ouster clause such as embodied in s 33B(1) of the Act does not preclude the supervisory jurisdiction of the High Court to issue an order of certiorari. In this respect Abdul Hamid LP in *Sabah Banking Employees' Union* v *Sabah Commercial Banks' Association*[2] at p 286 said:

> Industrial Court awards are statutorily sheltered from appellate review by s 33B(1) of the Act which provides.... Nonetheless, it has been consistently held that such privative or ouster clauses cannot proscribe certiorari against awards that exceed the inferior tribunal's jurisdiction. The Privy Council so interpreted this same ouster clause when it was then s 29(3) of the Act: *South East Asia Fire Bricks* v *Non-Metallic Mineral Products Manufacturers Employees Union* [1980] 2 MLJ 165. And following the decision of the House of Lords in *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147, Lord Reid in his speech made it clear that the ouster clause will not have the effect of ousting the power 'although the tribunal had jurisdiction to enter on the inquiry if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity'. The decision may be a nullity by reason of a breach or failure to comply with the requirements of natural justice.

Section 30(7) of the Act reads:

> An award may specify the period during which it shall continue in force, and may be retrospective to such date as is specified in the award;
> *Provided that the retrospective date of the award may not*, except in the case of a decision of the court under section 33 or an order of the court under section 56(2)(c) or an award of the court for the reinstatement of a workman on a reference to it in respect of the dismissal of a workman, *be earlier than six months from the date on which the dispute was referred to the court.* (Emphasis added.)

Mr Varughese, counsel for the applicant, urged the court to read the word 'may' as 'shall', thereby making sub-s 7 a mandatory provision and cited *Fung Keong Rubber Manufacturing (M) Sdn Bhd* v *Lee Eng Kiat & Ors*[3] as the authority. But in my view the reasons given by the Federal Court in *Fung Keong*'s case[3] for a strict construction on the time-limit clause are inapplicable here for the Federal Court said at p 240:

> In our view the whole purpose of this part of the legislation is to provide workmen with a cheap and speedy remedy to obtain reinstatement. Quite clearly it would be extraordinarily difficult for employers to keep industry going if claims for reinstatement on the ground of wrongful dismissal could be made many months or years, instead of the statutory period of one month, after dismissal had taken place.

For myself I would read the word 'may' as discretionary and at most, directory and I say so for the following reasons:

(a) The restriction imposed on the power to make the award retrospectively is applicable only in respect of cases where the parties do not agree on the effective date of the agreement. This is obvious as if the parties took time to settle the dispute on some substantial matters but agreed on the date of its implementation and thereby finally referred the dispute under s 26(2) of the Act to the Minister of Labour late, then the whole scheme will be defeated especially in view of the fact that this agreement is to be a continuation of the previous agreement. In my view this will be in conflict with s 30(5) which reads:

> The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

In fact there is nothing to stop the parties from agreeing to certain proposals even though the Act, for example under s 13(3), may exclude the right of one party, ie a trade union, from including such a proposal (see *Non-Metallic Mineral Products Manufacturing Employees' Union* v *Malaya Glass Factory Bhd*[4]).

(b) If the implementation date in respect of rates of pay is not the same as the other matters, it would lead to absurdity as the rates of pay to a certain extent hinge on the other matters like art 20 (bonus) and art 22 (advances for housing loan and sundry loans), to cite a few.

(c) It does not make it extraordinarily difficult for the applicant to keep the industry going by such a retrospective order (earlier by two weeks) as opposed to what the Federal Court said in *Fung Keong*'s case.[3]

Mr Varughese further submitted that the court should consider whether the matters before it have got merits irrespective of whether they are technical in nature or not. The short answer to this submission is that the court here is not sitting as an appellate court to review the findings of the inferior tribunal. The Federal Court in *Hotel Equatorial (M) Sdn Bhd* v *National Union of Hotel, Bar & Restaurant Workers & Industrial Court of Malaysia*[5] said at p 371:

> The High Court, it must be observed, has no jurisdiction to consider the merits of the case, its only function is to consider whether the inferior tribunal has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit.

Next, on the issue of consent. Mr Varughese cited a passage at p 178 of the case of *Federal Hotel Sdn Bhd* v *National Union of Hotel, Bar & Restaurant Workers*[6] and I quote:

> We do not think there was any such acquiescence in the situation thrust on the appellant but in any event jurisdiction

does not originate in the consent of the parties and cannot be established, where it is absent, by such consent or acquiescence. It is fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction (*Essex County Council* v *Essex Incorporated Congregational Church Union* [1963] AC 808).

The situation in the *Federal Hotel* case[6] is somewhat different from the present case as there the Federal Court held that the Industrial Court had no power to assume jurisdiction in making the second award under either s 33(2) or s 56, both of which did not apply. Here the Industrial Court has the power to make a restrospective order of the award though restricted to not earlier than six months from the date on which the dispute was referred to the Industrial Court. At most, I think, there is only an error of law committed by the Industrial Court and which to my mind does not go to lack or excess of jurisdiction.

The *Malaya Glass Factory Bhd* case[4] cited by me earlier and my construction of the word 'may' will provide the answer to the issue of consent.

To further support his submission, Mr Varughese cited the case of *Malayawata Steel Bhd* v *Union of Malayawata Steel Workers*[7] where at p 89, Gunn Chit Tuan J (as he then was) in construing s 30(7) of the Act said that there was an error of law on the face of the record justifying the High Court in making an order of certiorari on that ground alone. It should be noted that at the time *Malayawata*'s case[7] was decided, the case of *South East Asia Fire Bricks*[9] was not decided yet and therefore the learned judge did not have the benefit of the decision of *South East Asia Fire Bricks*[9] and if he had, the decision could very well be different (see *Malayan Commercial Banks Association* v *National Union of Bank Employees*[8]). In the *South East Asia Fire Bricks* case,[9] the Privy Council said at p 168:

> Whatever the policy underlying s 53A, it provides strong reinforcement for the view that awards of the Industrial Court are not subject to review by certiorari merely on the grounds of error of law.

Further on the same page, the Privy Council said:

> For the present purpose their Lordships will assume, without deciding, that the award contained one or more errors of law upon its face. If so, the error or errors did not affect the jurisdiction of the Industrial Court and their Lordships are therefore of the opinion that s 29(3)(a) [now s 33B] effectively ousted the jurisdiction of the High Court to quash the decision by certiorari proceedings.

The Federal Court in the *Malayan Commercial Banks Association* case,[8] at p 185 had this to say:

> The Judicial Commissioner heard the appeal before the decision of the Privy Council in *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165. In the light of that case, we do not think the learned Judicial Commissioner was right to grant the respondent's application for an order of certiorari on ground of error of law which did not affect jurisdiction. In that case, the Privy Council reviewed the various local authorities and came to the conclusion that the decisions do not amount to a line of authority establishing that certiorari is available to quash an award of the Industrial Court for a mere error of law on the face of the record. As regards *Mak Sik Kwong* v *Minister of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175, the Privy Council was of the view that the learned judge distinguished correctly between errors of law that give rise to excess or lack of jurisdiction which would justify the court in issuing an order of certiorari.

In fact s 30(7) of the Act was considered by the Federal Court in *Re Dunlop Estates Bhd.*[10] I would follow the obiter dictum of the court that the excess of two weeks in this case is an error of law on the face of the record when it said at p 251:

> We are inclined to view its award as one which arose from a finding of fact, but even if it could be said that this award, or that part of it in excess of six months from the date of reference is contrary to s 30(7) of the Act (which we think it is not) and therefore constitutes an error of law on the face of the record, the effect of the decision in *South East Asia Fire Bricks Sdn Bhd* [1980] 2 MLJ 165 is that s 29(3)(a) [new s 33B(1)] effectively ousts the jurisdiction of the High Court to quash the award.

In the premises, I hold the view that even if I am wrong in my construction of s 30(7) of the Act that the word 'may' should not be read as 'shall' and the issue of consent, the error committed by the Industrial Court in this case constitutes an error of law on the face of the record and the effect of the decision, following the line of authority cited by me, effectively ousts the jurisdiction of the High Court to quash the part of the award which the applicant urged me to do. In the circumstances the applicant fails on this ground.

The biased computation of CPI increase in Award No 9/89 as authority to apply to the present Award No 56/89

It may be true that the Industrial Court may have made errors in the computation of CPI. In any event, the Industrial Court had adequately considered this issue at pp 130-133 of the record and in my view such finding cannot be said to be so perverse and so devoid of plausible justification that no reasonable body of persons could have reached it as in the case of *Malayan Banking Bhd* v *Association of Bank Officers, Peninsular Malaysia & Anor*[11] relied on by the applicant. It is to be noted that here the Industrial Court is not computing on an absurd percentage though it could make errors in the computation. What the Industrial Court did is to be consistent n its computation and not depart from its earlier computation which the applicant wanted the Industrial Court

to do. In any event the answer to the applicant's complaint can be found at p 287 of the *Sabah Banking Employees' Union* case[2] where it is stated:

> So too was its calculation of EPF benefits. Errors in such calculations or in other factual considerations would not, in our view, go to the Industrial Court's jurisdiction.

It is to be noted that the Act does not specify the formula for the computation on the rates of pay and the legislature thought it best to leave it to the Industrial Court to find the basis for such computation as can be seen from s 30(4) and (5) which read:

> (4) In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.
>
> (5) The court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

I would in the circumstances hold that the errors, if any, in the computation by the Industrial Court here do not go to the Industrial Court's jurisdiction and therefore there are no grounds for me to issue the order of certiorari as prayed for by the applicant.

For the reasons stated by me I dismiss this originating motion with costs.

Application dismissed.

Solicitors: *Sulong Matjeraie & Co Advocates*; *Sim & Tee Advocates*.

Reported by *Azra Moiz*

Standard Chartered Bank v Kentland Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-23-2688-1987
ZAKARIA YATIM J
4 APRIL 1990

Civil Procedure — Appeal — Decision of registrar — Rehearing — Admission of further evidence by affidavit — Rules of the High Court 1980, O 56

The plaintiff's application for summary judgment, alternatively that the defence be struck out, was dismissed by the registrar. On appeal, the plaintiff sought to rely on an affidavit filed after the original hearing. The second defendant objected.

Held, ruling that it was proper for the court to consider the new evidence:

(1) An appeal from the registrar to a judge-in-chambers operates by way of rehearing and it was common practice for the judge, subject to the question of costs, to admit further or additional evidence.

(2) The plaintiff was therefore entitled to rely on the affidavit filed after the hearing before the registrar.

Cases referred to

1 *Krakauer* v *Katz* [1954] 1 All ER 244 (distd)
2 *Ladd* v *Marshall* [1954] 1 WLR 1489 (distd)
3 *Langdale & Anor* v *Danby* [1982] 3 All ER 129 (distd)
4 *Kin May Construction Co Ltd* v *Wai Cheong Co Ltd & Anor* 29 BLR 137 (folld)

Legislation referred to

Rules of the High Court 1980 O 56

Cecil Abraham (*S Radhakrishnan* with him) for the plaintiffs.
SC Loh for the second defendant.

Cur Adv Vult

Zakaria Yatim J: This is an appeal by the plaintiff against the decision of the senior assistant registrar given on 11 May 1988 dismissing the two alternative prayers in the plaintiff's amended summons-in-chambers, namely, to enter final judgment against the second defendant for a sum of $2m pursuant to O 14; alternatively to strike out the defence of the second defendant pursuant to O 18 r 19 of the Rules of the High Court 1980.

At the commencement of the hearing of the appeal before me in chambers, Mr Cecil Abraham, counsel for the plaintiff, asked me to consider an affidavit filed by the plaintiff on 17 June 1988, that is after the senior assistant registrar had made his decision. Mr SC Loh, counsel for the second defendant, submitted that the said affidavit should not be considered.

In support of his submission, Mr Loh relied on the decision of the English Court of Appeal in *Krakauer* v *Katz*[1] and in *Ladd* v *Marshall*.[2] In *Krakauer* v *Katz*[1] an interlocutory matter was heard by a judge-in-chambers.